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IN THE SUPREME COURT
OF THE UNITED STATES

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, AND L. DIAN MAXWELL,

PETITIONERS,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF THE JUSTICES OF THE WASHINGTON SUPREME COURT

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QUESTIONS PRESENTED

Washington regulates the handling of client trust funds by legal professionals. The regulation challenged in this case, Washington's IOLTA (Interest On Lawyer Trust Accounts) rule ensures that client trust funds (1) earn a positive net return for the client whenever they are capable of doing so; (2) are not used for the benefit of the legal professional when they are incapable of earning a positive net return for the client; and (3) in the latter circumstance, are placed in an account that generates funding for public legal services, including legal services for the indigent. Admission to Practice Rule 12(h), 12.1.

1. Does Washington's IOLTA rule result in a *per se* taking?

2. Are clients whose trust funds are deposited in IOLTA accounts entitled to compensation under the Fifth Amendment, when they could not have realized a positive net return on their funds in the absence of the challenged rule?

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INTRODUCTION

Like numerous states, Washington regulates legal professionals in handling client trust funds. One such regulation, Rule of Professional Conduct 1.14(c), requires lawyers receiving client trust funds to place the funds in an interest-bearing account for the benefit of the client in any circumstances under which the funds may generate net interest for the client. When a lawyer receives client trust funds that cannot generate net interest for the client, the rule requires the lawyer to pool the client's funds with like-funds in an interest bearing account, known as an IOLTA account. The rule directs interest earned on IOLTA accounts to a nonprofit corporate entity, Respondent Legal Foundation of Washington, to be distributed for indigent legal services App. at 99a-102a.[1]

An essentially identical IOLTA rule, the rule challenged by the Petitioners, applies to persons licensed in Washington in the limited practice of law, e.g., "limited practice officers" or "certified closing officers". Washington Admission To Practice Rule (APR) 12(h), 12.1. App. at 103a-108a. These legal professionals are licensed and regulated by the Washington Supreme Court to select and complete legal documents necessary to effectuate property transactions. APR 12. App. at 103a.

Petitioners seek a writ of certiorari on two questions. In essence, Petitioners ask whether the challenged IOLTA rule effects a *per se* taking of interest earned on IOLTA accounts, and whether injunctive relief would be an available remedy, assuming a taking. Petition For Writ Of Certiorari (Pet.) at i. Respondent Justices of the Supreme Court of

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[1] App. refers to the Appendix To The Petition For A Writ Of Certiorari.

Washington respectfully request the Court to deny the petition for several reasons. First, the decision below is interlocutory, Petitioners' First Amendment claim having been remanded to the district court. App. at 45a. There is no compelling reason to consider review at this juncture. Second, Petitioners place significant reliance on a current conflict between the Ninth Circuit and a panel of the Fifth Circuit in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation* (*TEAJF*), 270 F.3d 180 (5th Cir. 2001) over whether IOLTA constitutes a *per se* taking. The conflict remains uncertain, however, as the Fifth Circuit has yet to rule on a petition for rehearing *en banc* in *TEAJF*. If the petition is granted, the panel decision would be vacated, and Petitioners' principal argument for certiorari would disappear. Third, the Ninth Circuit properly held that the challenged rule does not fall within the narrow class of government actions that constitute *per se* takings. The Ninth Circuit carefully and correctly applied the ad hoc takings analysis appropriate in all but the most extraordinary circumstances. Finally, Petitioners' question concerning the availability of injunctive relief is not presented in this case and it is not an appropriate vehicle for resolving the question.

STATEMENT

1. History Of IOLTA Relating To Lawyers

Washington's IOLTA program was established by rule of the Washington Supreme Court in 1984. *IOLTA Adoption Order*, 102 Wash. 2d 1101, 1102 (1984). As originally adopted, Washington's IOLTA rule applied only to attorneys. Washington Rule Of Professional Conduct (RPC) 1.14.

Prior to adoption of the IOLTA rule, Washington's rules of professional responsibility did not govern an attorney's conduct with respect to investing client trust funds held in connection with providing legal services. As the

Washington Supreme Court observed in *IOLTA Adoption Order* in 1984, then existing rules of professional responsibility "d[id] not address the question of whether attorneys must invest such funds for the benefit of clients". *IOLTA Adoption Order*, 102 Wash. 2d at 1102. In general, the rules provided that "attorneys must hold client trust funds in accounts separate from their own funds, and are obligated to maintain complete records and pay the funds over to the clients or others as soon as they are entitled to receive them". *Id.* See also American Bar Association Formal Opinion 348 (1982), concluding that in most instances where a lawyer is entrusted with client funds, the lawyer is merely under a duty to safeguard the funds and is not liable for interest for failing to invest them.

In *IOLTA Adoption Order*, the Washington Supreme Court explained that prior to IOLTA, lawyers "usually" invested client trust funds in interest-bearing accounts and paid the interest to clients when it was economically feasible to do so. By the same token, the Washington Supreme Court recognized that when Washington lawyers received client trust funds that could not generate net interest for the client, because the costs of establishing and administering an interest-bearing account would exceed any interest that could be earned, "most attorneys" simply deposited the funds into a single noninterest-bearing trust checking account. *IOLTA Adoption Order*, 102 Wash. 2d 1102. As the Washington Supreme Court noted, this situation essentially resulted in interest-free use of client funds by banks. *Id.*

This pre-IOLTA treatment of client trust funds likely resulted, at least in part, from two circumstances. First, client funds needed to be available on demand; and second, prior to 1980, federal law prohibited federally insured banks from paying interest on checking accounts. In 1980, Congress authorized interest-bearing Negotiable Order Of Withdrawal (NOW) accounts under those circumstances where the entire

beneficial interest in the account is in one or more individuals or a nonprofit organization operated primarily for religious, philanthropic, charitable, educational, political or similar purposes. 12 U.S.C. § 1832.

With adoption of the IOLTA rule, Washington's rules of professional conduct required lawyers receiving client trust funds to place the funds in an interest-bearing account for the benefit of the client, in any circumstances in which they could generate net interest for the client. With adoption of IOLTA, Washington's rules of professional conduct required lawyers who received client trust funds that could not generate net interest for the client to pool the client's funds with other such client trust funds in an interest-bearing account, with the interest paid to a nonprofit corporate entity, to be distributed for public legal services.

Washington's rule authorizes the deposit of client trust funds in an IOLTA account only when it is not possible for the funds to earn net interest for the client. *IOLTA Adoption* Order, 102 Wash. 2d at 1101 ("[W]e make clear that those funds available for the IOLTA program are only those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client."). In this respect, the rule is "self-adjusting", requiring legal professionals to invest more client trust funds for clients as more cost-effective accounting services become available and make it possible to earn net interest on "increasingly smaller amounts held for increasingly shorter periods of time". *IOLTA Adoption Order*, 102 Wash. 2d at 1114.

2. History Of IOLTA Relating To Limited Practice Officers

In 1981, the Washington Supreme Court held that the selection and completion of legal documents necessary to effectuate property transactions constituted the practice of

law. *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 635 P.2d 730 (Wash. 1981). At that time, it had become common for such services to be provided by escrow and title companies without the benefit of a lawyer. Shortly thereafter, the Washington Supreme Court adopted rules to license and regulate legal professionals performing these functions. APR 12. These licensed legal professionals are referred to as "limited practice officers" (LPO's), or sometimes as "certified closing officers".

In 1995, the Washington Supreme Court considered a proposal to apply the IOLTA rule to transactions handled by LPOs, in addition to lawyers. As Petitioners acknowledge, prior to the challenged IOLTA rule, escrow and title insurance companies never deemed interest-bearing client trust accounts a "realistic option[] for their trust funds due to the difficulty in crediting the proper amount of interest to each person whose funds have passed through the escrow account" and because "they may not be used for funds belonging to a for-profit corporation". Pet. at 5. Escrow and title companies maintained this practice even after Congress authorized interest-bearing NOW accounts in 1980. App. at 33a.

The Washington Supreme Court received public comment on the proposal to extend the IOLTA rule to LPOs and solicited argument. In a brief arguing for application of the IOLTA rule to LPOs, the Washington State Bar Association noted that LPOs and lawyers were similarly situated with respect to the rule and pointed out that escrow and title companies employing LPOs were receiving substantial indirect benefits from banks in return for noninterest-bearing client trust deposits. The Bar Association's brief expressed concern that such benefits fostered the potential for serving self-interest, rather than client interest, in the handling of client funds, and in the handling of these legal transactions. Petitioners acknowledge

that firms employing LPOs received benefits from their banks in return for noninterest-bearing client trust fund deposits, in the form of "earnings credits". Pet. at 5. These credits—a function of the size of the noninterest-bearing deposits, the period the deposits were held, and a contracted percentage rate—are applied by escrow and title companies to pay for accounting and other services provided to them.[2] Washington's relatively recent consideration of IOLTA in the context of LPOs thus provides insight into marketplace opportunities for legal professionals in directing the deposit of client trust funds when banks are not required to pay interest on such funds, and makes apparent the opportunity for legal professionals to serve self-interest rather than their client's interest in placing client funds in the absence of the IOLTA rule.

The Washington Supreme Court adopted the challenged IOLTA rule for transactions handled by LPOs. In all relevant respects, the rule is identical to the rule that applies to lawyers. Thus, APR 12.1(c)(3) protects clients by requiring LPOs to deposit client trust funds in an interest-bearing account for the benefit of the client whenever it is possible to earn a net return for the client. As is the case with lawyers, APR 12.1(c)(1) also requires LPOs to pool client trust funds that cannot earn a net return for the client in an interest-bearing IOLTA account with the proceeds directed to the Legal Foundation of Washington. Thus, the IOLTA rule ensures that when a client's trust funds are not able to generate a net return for the client, the funds will not be used to benefit the legal professional, creating the potential for conflicts of interest, but will be pooled with other like-client

[2] This practice existed despite a state regulation that prohibited escrow agents from using such funds for their own benefit. Wash. Admin. Code § 208-680E-0011.

funds in an IOLTA account, to provide legal services to the poor.

3. Proceedings Below

Petitioners filed a complaint in the United States District Court for the Western District of Washington, challenging Washington's IOLTA rule governing limited practice officers. The plaintiffs were two clients of LPOs whose escrow funds were placed in an IOLTA account under APR 12(h) and 12.1(c)(1) (Brown and Hayes), an LPO (Daugs), a former LPO (Maxwell), and the Washington Legal Foundation, a public interest law organization. Petitioners alleged that Washington's IOLTA rule constituted a taking of property without just compensation and that it violated the First Amendment by requiring support of expressive activities with which they disagree.

On cross motions for summary judgment, the district court held that owners of funds placed in an IOLTA account had no cognizable claim to the earnings of IOLTA accounts, because their funds could not have generated such interest in the first instance. Finding such an interest "a prerequisite to establishing either a First or Fifth Amendment claim", the district court granted summary judgment to Respondents. App. at 92a, 96a. Petitioners appealed.

While hearing on Petitioners' appeal was pending in the Ninth Circuit, this Court decided *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). There, in the context of a Fifth Amendment challenge to Texas' IOLTA rule, the Court held that interest earned on IOLTA accounts is the property of the clients whose principal is deposited in the accounts. The Court expressly did not consider whether the Texas IOLTA rule constituted a taking or, if it did, what compensation, if any, would be due. *Id.* at 172.

Subsequently, a three-judge panel of the Ninth Circuit reversed the district court, held that Washington's IOLTA rule falls within the narrow class of government action that constitutes a *per se* taking, and remanded the Fifth Amendment claim to the district court for a determination of just compensation, if any. The three-judge panel did not reach Petitioners' First Amendment claim. App. at 84a. Respondents petitioned for rehearing and rehearing *en banc*. Respondents' petition was granted, and the decision of the three-judge panel was vacated.

On rehearing *en banc*, the Ninth Circuit first held that only petitioners Brown and Hayes, LPO clients whose funds were placed in IOLTA accounts in connection with real estate transactions, had standing to challenge Washington's IOLTA rule under the Fifth Amendment. The court below then held that the challenged rule is not within the narrow class of government actions that constitute *per se* takings. App. at 31a-32a. Reviewing the challenged rule under the ad hoc analysis that applies to Fifth Amendment takings claims, except in extraordinary circumstances, the Ninth Circuit held that Washington's IOLTA regulation does not constitute a taking. App. at 40a-41a. The court below correctly considered the fact that (1) the IOLTA rule had no impact on the reasonable economic expectations of either of the owners of the principal placed in IOLTA accounts (Brown and Hayes), as neither would have earned a net return on their funds in the absence of the rule (App. at 33a); (2) neither Brown nor Hayes demonstrated that their transactions were more costly as a result of the IOLTA rule (App. at 38a); (3) neither Brown nor Hayes had any investment-backed expectation that their funds would earn interest while in escrow (App. at 38a-39a); and (4) the challenged rule serves important public purposes with respect to the legal system, from which Brown and Hayes benefit (App. at 40a). The Court of Appeals also held that even if Washington's IOLTA

regulation constituted a taking, the LPO clients would be entitled to nothing by way of just compensation, as IOLTA took from them no property interest that they would have had in the absence of the challenged rule. App. at 41a-45a. Having determined that Petitioners failed to establish a Fifth Amendment claim, the Ninth Circuit ordered no relief. The Court of Appeals remanded Petitioners' First Amendment claim to the district court. App. at 45a.

REASONS FOR DENYING THE PETITION

1. The Interlocutory Nature Of The Decision Below Argues Against Review

Petitioners' First Amendment challenge to IOLTA has not been resolved. This Court has declined requests for review on the basis that a federal court decision, like the decision below, is interlocutory. *See, e.g., Bhd. of Locomotive Firemen & Enginmen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967). Such decisions pose the risk of premature and piecemeal consideration. Moreover, denial of interlocutory review does not jeopardize the opportunity for review when the case is fully ripe. This case does not present circumstances sufficiently compelling that the Court should overlook its procedural posture. Review at this juncture is not warranted.

2. The Circuit Conflict On Which Petitioners Rely May Prove To Be Temporary

It is true as Petitioners assert that there presently is a conflict between the decision of the Ninth Circuit and the decision of a three judge panel of the Fifth Circuit in *TEAJF*, 270 F.3d 180, over whether IOLTA constitutes a *per se* taking. However, it is uncertain whether the conflict will continue, as a petition for rehearing *en banc* remains pending in *TEAJF*. If the petition is granted, one primary basis for review offered by Petitioners will cease to exist and may not

again arise. The conflict on which Petitioners rely offers no compelling reason to review the question whether the IOLTA rule effects a *per se* taking in this case. Petitioner Washington Legal Foundation is a party in *TEAJF*, and there is little reason to doubt that the Court will have the opportunity to consider a petition for certiorari in *TEAJF* regardless of its ultimate outcome.

3. The Decision Below Is Entirely Consistent With The Court's Takings Jurisprudence

The Ninth Circuit analyzed the challenged rule under the broadly applicable ad hoc takings analysis of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25 (1978). In light of the public welfare purposes of the rule and its nonexistent effect on Petitioner clients' reasonable economic expectations, the Ninth Circuit correctly concluded that Washington's IOLTA rule effects no taking. Alternatively, the Ninth Circuit held that even if the rule resulted in a taking, just compensation to the Petitioner clients would be zero. App. at 45a. Petitioners do not challenge the conclusions reached by the Ninth Circuit under this analysis. Rather, based on their view that Washington's rule constitutes a *per se* taking, Petitioners contend that the analysis does not apply.[3]

[3] The Petitioners raise a *per se* takings claim in this Court, repeatedly asserting that the challenged IOLTA rule "confiscates" interest earned on client funds deposited in IOLTA accounts. Pet. at i, 10, 17 n.6, 19, 21, 29. Consistent with this single claim, Petitioners contend that the interest earned on their funds placed in IOLTA accounts is the measure of "just compensation". *See* Pet. at 22 (cases valuing property taken "ha[ve] no relevance here, where the property taken is money and thus has a readily ascertainable value"). Petitioners' argument regarding injunctive relief also makes this plain. *See* Pet. at 28 ("just compensation" under the challenged IOLTA rule would be a dollar for dollar repayment of interest earned on IOLTA accounts). In this respect, Petitioners here, like the petitioners in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). "do not contend that the State's regulation of the manner in which [legal professionals] hold and manage client funds amounts to a taking of private property". *Phillips*, 524 U.S. at 164. Accordingly, Petitioners' discussion of "earnings credits" at page 6 of their Statement Of The Case is irrelevant.

A. None Of The Cases Cited By Petitioners Suggest That IOLTA Is Within The Narrow Class Of Regulations That Constitute *Per Se* Takings

Petitioners cite three cases as supporting their claim that Washington's IOLTA rule is among the narrow class of regulations that the Court has determined to be *per se* takings, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). None support the Petitioners' position, and numerous decisions of the Court demonstrate Petitioners' error.[4]

At issue in *Webb's* was whether a statute authorizing a county to retain interest earned on interpleaded funds, in addition to a separate service fee, constituted a taking of the interest. The *Webb's* opinion demonstrates that the Court engaged in what subsequently has been labeled ad hoc takings analysis. The Court considered the nature and purpose of the government's action, the legitimate

[4] Petitioners make the remarkable assertion that the Fifth Circuit would have found Texas' IOLTA rule a taking "regardless whether it was examined using a *per se* or *Penn Central* analysis". Pet. at 16-17. Petitioners cite nothing in the decision of the Fifth Circuit to support this conclusion or their novel view that regulatory takings are simply a subcategory of *per se* takings. Petitioners' argument is wholly circular and, in the end, amounts to nothing more than saying that a *per se* taking is a *per se* taking. Pet. at 17 n.6.

expectations of Webb's creditors, and the statute's economic effect on them. The Court examined possible justifications for the county's retention of the interest (*Webb's*, 449 U.S. at 162-63); noted the necessity of resorting to the statute if the depositor was to have any protection from creditor claims (*id.* at 164); and considered that "Webb's creditors . . . had more than a unilateral expectation" in the interest earned on the interpleaded funds (*id.* at 161). Moreover, it was plain that the interpleaded funds were large enough to earn a substantial net return for Webb's creditors absent the state's intervention. The *Webb's* Court did not simply identify the interest as the property of Webb's creditors, declare a *per se* taking, and end its inquiry. Instead, the Court weighed the public and private interests involved and found a taking "under the narrow circumstances of this case" only after concluding that there was not "any reasonable basis to sustain the taking of the interest". *Id.* at 164, 163.

Sperry Corp. is no more helpful to Petitioners' call for *per se* takings analysis than is *Webb's*. In that case, Sperry Corporation challenged as a taking, a fee imposed by the United States on users of the Iran-United States Claims Tribunal. The Court rejected the challenge and in doing so disavowed a fundamental premise of Petitioners' argument and the *TEAJF* decision. Petitioners essentially contend that IOLTA interest should be treated as though it is real or personal property, and its payment to the Legal Foundation of Washington as though it is tantamount to an invasion or physical appropriation of property. *Sperry Corp.* rejected the notion that a payment of money should be analyzed as a physical appropriation of property.

> "It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. . . . If the deduction in this case were a physical occupation requiring just compensation, so

> would be any fee for services". *Sperry Corp.*, 493 U.S. at 62 n.9.

So too, would be any payment or cost associated with a regulation that may be expressed in a specific dollar amount. As *Sperry Corp.* recognized, "[s]uch a rule would be an extravagant extension of *Loretto*." *Id.* [5]

To similar effect is *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, the Court rejected an argument by a mobile home park owner that the combination of a rent control ordinance and a mobile home residency law effected a physical taking of his property by transferring wealth from the park owner to incumbent mobile home owners. The Court explained that the particular regulatory scheme might make the transfer of wealth "more *visible* than in the ordinary case but the existence of the transfer itself does not convert regulation into physical invasion". *Yee*, 503 U.S. at 529-30 (cite omitted). The Court plainly has sustained against takings challenges government regulations that transfer value from private parties, whether or not the value is expressed as a specific dollar amount. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (holding that the Multiemployer Pension Plan Amendments Act of 1990 did not constitute a takings challenge, where "there is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability".); *Concrete Pipes & Prod. of California, Inc. v. Constr. Laborers Pension Trust For Southern California*, 508 U.S. 602 (1993).

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[5] Petitioners seem to suggest that under *Sperry Corp.*, costs associated with government regulation constitute *per se* takings unless they can be justified as user fees. Pet. at 21-22. Neither *Sperry Corp.* nor *Phillips* supports such a notion, and the notion itself is belied by the fact that virtually all government regulation entails costs to regulated parties.

Nor does *Phillips* argue for the approach suggested by Petitioners and taken by the Fifth Circuit in *TEAJF*. *Phillips* addressed the single narrow question of whether interest earned on IOLTA accounts is the property of the clients whose funds are deposited in such accounts. *Phillips* held that it is. The Court expressly declined to consider "whether these funds have been 'taken' by the State . . . [or] the amount of just 'compensation,' if any, due respondents", and left those issues for remand. *Phillips*, 524 U.S. at 172. *Phillips* thus hardly signals the "sea change" in takings analysis that the Petitioners posit.

Petitioners seek exceptional treatment of the challenged IOLTA rule in arguing that the Court should categorize it as a *per se* taking. *Tahoe-Sierra Preservaion Coun., Inc. v. Tahoe Regional Planning Agency*, No. 00-1167, 2002 WL 654431, *17 (U.S. Apr. 23, 2002), reaffirms the broad application of multifactor takings analysis and the Court's long resistance "to adopt what amount to *per se* rules in either direction". (Quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)). As the Court explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), "[i]n 70-odd years of . . . regulatory takings jurisprudence [succeeding *Pennsylvania Coal Co .v. Mahon*, 260 U.S. 393 (1922)], we have generally eschewed any set formula for determining how far is too far, preferring to engag[e] in . . . essentially ad hoc factual inquiries". *Lucas*, 505 U.S. at 1015 (internal quotation marks omitted). The Court identified only "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint": "regulations that compel the property owner to suffer a physical 'invasion' of his property", and "regulation [that] denies all economically beneficial or productive use of land". *Lucas*, 505 U.S. at 1015. The challenged IOLTA rule fits neither of these

categories. Moreover, in light of the rule's nonexistent effect on Petitioners' reasonable economic expectations, and in light of the evident dissimilarities between physical invasions of real property and transfers of intangible monetary value, there is no reason for categorical treatment of the IOLTA rule.

B. The Decision Below Is Faithful To The Purpose Of The Takings Clause And Its Analytical Framework In Concluding That The IOLTA Rule Does Not Effect A Taking

The Takings Clause is not intended to bar government regulation of property. Government regulation does not implicate the Takings Clause unless it "goes too far" (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)), and "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Whether government regulation goes too far "depend[s] on a complex of factors including the regulation's economic effect . . . the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action". *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, (2001) (citing *Penn Central Transp. Co.*). As the Court recognized in *Palazzolo*, it is consideration of these several factors that informs the question of whether government regulation "goes too far".

The Ninth Circuit analyzed Washington's IOLTA rule in light of this "complex of factors". As the Ninth Circuit concluded, the factors dictate that the challenged IOLTA rule does not effect a taking. Considering first the nature of the government action, APR 12.1 is regulatory. It governs the handling of client trust funds by legal professionals to ensure that (1) the deposits earn net interest

for the client whenever they are capable of doing so; (2) the deposits are not used for the benefit of the licensed legal professional when they are incapable of earning net interest for the client; and (3) in the latter circumstance, the deposits are placed in an account that generates funding for public legal services, including legal services for the indigent. In each of these respects, the rule substantially furthers the public welfare. It safeguards important interests of clients whose deposits it regulates, and it benefits the civil justice system.

Turning next to the economic effect of the challenged regulation on the client and any interference with investment-backed expectations, it must be observed that trust funds directed to IOLTA accounts by the challenged rule would earn no net return for the client in the absence of the rule. Indeed, such funds would not have been put in an interest-bearing account at all, absent the IOLTA rule. For the same reason, it cannot be said that the rule interferes with any reasonable investment-backed expectation of clients. The clients in this case readily admit that they had no expectation of earning a return on these funds. App. at 38a-39a. On the other hand, the rule requires client trust funds that are capable of earning a net return for the client to be put in an interest-bearing account for the benefit of the client. In addition, the challenged rule does not interfere with the purposes for which the clients placed their funds in the commercial marketplace in the first instance. Under the rule, client trust funds directed to an IOLTA account remain available to the client without delay and accomplish all of their intended purposes. APR 12.1(c).

For each of the reasons noted by the *en banc* court below, it cannot be said that Washington's IOLTA rule goes too far and forces clients "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". *Armstrong*, 364 U.S. at 49.

C. The Decision Below Is Consistent With The Court's Takings Jurisprudence In Concluding That Just Compensation In This Case Would Be Zero

The purpose of "just compensation" under the Fifth Amendment is to place the property owner in the same economic position that the owner would have been in absent the government action constituting the taking. *Olson v. United States*, 292 U.S. 246, 255 (1934). Even if there were a taking here, there is no dispute that, absent the challenged IOLTA rule, Petitioner clients could not have realized net interest on their trust funds. *Phillips* recognized that "the interest income at issue here may have no economically realizable value to its owner". *Phillips*, 524 U.S. at 170. In asserting as "just compensation" the interest earned on IOLTA accounts (Pet. at 22), Petitioner clients do not claim property that they would have had in the absence of the challenged rule, for they could not have generated net interest on their trust funds. Rather, they claim what the government has gained. This is contrary to the Court's jurisprudence confirming that under the Fifth Amendment "the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910); *United States ex rel. Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 281-82 (1943).[6] In concluding that even if the challenged rule effected a taking, just compensation would be zero, the court below, like this Court, declined to turn a blind eye to economic reality. The Fifth Amendment does not require government "to pay for a loss

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[6] Petitioners offer no authority and no logical justification for the assertion that this well-established principle is limited to takings involving real property. Pet. at 22.

of theoretical creation, suffered by no one in fact". *Boston Chamber of Commerce*, 217 U.S. at 194.

4. This Case Presents No Occasion To Address The Circumstances Under Which Injunctive Relief May Be An Available Remedy For A Takings Claim

The availability of injunctive relief under the circumstances posited by the Petitioners' second question presented was not addressed by the decision below. The Ninth Circuit addressed injunctive relief in this case only in the limited context of determining that the Washington Legal Foundation lacks representational standing to bring its Fifth Amendment claim.[7] This holding is not challenged in the petition and, accordingly, is not before the Court. *Yee*, 503 U.S. at 535 (under Rule 14.1(a), "only the questions set forth in the petition, or fairly included therein, will be considered by the Court").[8]

An association such as the Washington Legal Foundation has standing to sue on behalf of its members only if, *inter alia*, "neither the claim asserted nor the relief requested requires the participation of individual members in

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[7] Petitioners state that the court below relied on the unavailability of injunctive relief in holding that the LPOs in this case, Daugs and Maxwell, lack standing to assert a takings claim. Pet. at 23 n.9. This is not correct. The Ninth Circuit held that neither of these parties has a property interest in IOLTA earnings and that, absent such an interest, neither has standing to assert a Fifth Amendment claim. App. at 16a, 17a.

[8] Similarly, the petition does not seek review of the Ninth Circuit's holding that only Petitioners Brown and Hayes, LPO clients whose funds were placed in IOLTA accounts, have standing to challenge Washington's IOLTA rule under the Fifth Amendment. Thus, Petitioners' references to the Fifth Amendment claims of parties other than Brown and Hayes should be disregarded.

the lawsuit". *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977), App. at 17a. In this case, the Ninth Circuit reached the unremarkable conclusion that the appropriate remedy for the Petitioners' taking claim, if any remedy were required, would be to provide "just compensation" to the clients whose property allegedly was taken. App. at 18a. As the Ninth Circuit concluded, determining "just compensation" necessarily requires the participation of individual members whose property allegedly was taken, and their necessary involvement means that standards for asserting representational standing have not been met. App. at 19a.

Petitioners posit this discrete standing determination as a holding on the availability of injunctive relief in takings cases that creates a conflict of authority in the circuits. This does not withstand scrutiny. As Petitioners recognize, the Ninth Circuit "neither defined the circumstances in which such relief is available nor engaged in any detailed analysis whether, in this case, compensation would adequately remedy the alleged violation of Fifth Amendment rights". Pet. at 24. This likely results from the fact that Petitioners never suggested in this case that "just compensation" would fail to adequately address the alleged taking. Moreover, the Ninth Circuit found no taking warranting *any* remedy. Thus, it hardly is surprising that the decision below had little to say on the subject of injunctive relief. Moreover, to the extent the Ninth Circuit discussed the availability of injunctive relief in takings cases, it recognized that such relief ordinarily is not the appropriate remedy, but in certain limited circumstances, such relief has been granted. App. at 18a. This effects no change in the law relating to takings. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by

law, when a suit for compensation can be brought against the sovereign subsequent to the taking." (Footnote omitted.)).

In addition, the Court of Appeals cases from the Second and D.C. Circuits cited by Petitioners are not in conflict with the decision below. They proceed from the notion that injunctive relief is available with respect to a taking where a statute requires a person to pay money directly to the government, and just compensation would be a dollar for dollar repayment of that amount by the government. Under such circumstances, the cited courts have assumed that the government has no intention of providing dollar for dollar compensation for the required payment. *See In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995); *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 401-02 (D.C. Cir. 1997). Here, there is no such payment and even the initial three-judge panel and the *en banc* dissent, adopting the panel opinion, concluded that just compensation would not necessarily amount to a dollar for dollar payment of IOLTA interest. App. at 85a. The only other case cited by Petitioners in support of their claimed split with the Ninth Circuit concerning the availability of injunctive relief is *TEAJF*, and it too is inapposite. In *TEAJF*, the Fifth Circuit concluded that monetary relief was not available and that the defendants had conceded the availability of injunctive relief. Regardless of whether the Fifth Circuit was correct in these respects (*see TEAJF*, 270 F.3d at 196 (Wiener, J., dissenting)), that is not the case here.

Finally, Petitioners' request that the Court consider the availability of injunctive relief in this case also seems to be based on an unstated assumption that Washington would maintain its IOLTA rule and yet decline to make compensation available in the face of a final judicial determination that compensation is required under the Fifth Amendment. Petitioners' assumption fails to accord to the state respect for the rule of law. *Dombrowski v. Pfister*, 380

U.S. 479, 485 (1965) ("It is generally to be assumed that state courts . . . will observe constitutional limitations as expounded by this Court[.]").

In sum, this case presents no occasion for the Court to consider the circumstances under which injunctive relief may be available to remedy a taking.

CONCLUSION

For each of these reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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